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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 61

GERTRUDE KAY, ALIAS GERTRUDE KLEIN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

W. S. CULBERTSON,
FRANK R. SERRI,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinion Below.

The opinion of the Circuit Court of Appeals, by Manton, Circuit Judge, is not yet reported but appears in the record at page 595.

Jurisdiction.

The order of the Circuit Court of Appeals affirming the judgment of the District Court was entered April 12, 1937.

The petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code and Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether the Home Owners' Loan Act of 1933, as amended in April, 1934, in so far as it creates the Home Owners Loan Corporation is constitutional.

2. Whether Section 1467 (e) of the Home Owners' Loan Act, as amended in April, 1934, relating to charges, is constitutional.

3. Whether Section 1467 (a) of the Home Owners' Loan Act, relating to false statements, is constitutional.

4. Whether Section 1467 (a), as to making any false statements, applies to an overstatement as to the balance due on a second mortgage or whether such overstatement is solely covered by the phrase in this section of "or whoever willfully overvalues any security."

5. Whether a trial judge has the power under Rule IX of the Criminal Appeals Rules to extend the time for settling and filing a bill of exceptions by an order not entered within thirty days after the taking of the appeal.

6. Whether the Circuit Court of Appeals has the power under Rules IV and IX of the Criminal Appeals Rules to consider a bill of exceptions so filed, particularly where important constitutional questions are properly before the court and can be adequately considered only in the setting of the particular record.

7. Whether a defendant who has moved swiftly to comply with the rules, is without fault and relied on the stipulation of the United States District Attorney and the order of the trial judge—thus losing the opportunity to settle the bill on the stenographer's minutes—is not deprived of her liberty without due process of law if her bill of exceptions is not considered.

Statement.

The indictment against this defendant, a mortgage and real estate broker, consisted of 25 counts, covering in all ten separate transactions with ten different owners.

A. *Section 1467 (e) of the Home Owners' Loan Act, as Amended April 1934.*

There were 20 counts which charged violations of Section 1467 (e) of the Home Owners' Loan Act, as amended in April, 1934 (the phrase "in connection with a loan" is omitted by the amendment), relating to soliciting, contracting and receiving fees from applicants for loans contrary to its provisions. The counts do not set forth what the services were for which the defendant solicited, contracted and charged. They contain the general allegation that the services were in connection with a loan from the Home Owners Loan Corporation and quote the words of the statute that the charge "was not for an ordinary charge or fee authorized and required by the said Home Owners Loan Corporation for services actually rendered for examination and perfection of title, appraisal and like necessary services" (R. 7).

In most instances, these contracts were in writing. They were also contingent contracts, payable only if the defendant performed by obtaining the necessary reductions in certain mortgages, the waiver of interest payments, other modifications in the terms of the mortgages or the stay of threatened or pending foreclosures.

While there was some dispute as to the precise credit to be given to the defendant for her services—the owners who had broken their contracts naturally minimized it and one or two of the closing attorneys claimed part of the benefit—there was no dispute that the outside work which the de-

fendant agreed to do was there to be done, that it required a considerable expenditure of her time and effort, and that after her intervention, reductions followed in several cases. For all her work in these ten transactions the defendant retained $140 (R. 346).

The substantial, separate and distinct character of these contracts and these services is not altered because the defendant wrote a few letters for the owners in their own names to the Home Owners Loan Corporation, nor because the Assistant District Attorney, with a barrage of leading and unfair questions, attempted to inject into the case the idea that the defendant was "to help put through the home loan" or "to get it through quickly."

The contracts made and the services rendered by the defendant were the adjustment of payments, modification of terms of mortgages, stay of foreclosures, removal of receivers, and reduction of the principal due on mortgages. The owners called in the defendant when foreclosure threats were made or foreclosure papers actually served or a receiver appointed or a notice sent to the owners by the Home Owners Loan Corporation that their loan was approved but that the encumbrances exceeded the loan and that consequently it would be necessary for the owner to get the required reductions. In each case, some such practical difficulties or problems confronted the owner. These obstacles were not invented by the defendant. They were real and had to be removed. This genuine need produced contracts with the defendant.

The defendant was found guilty under six counts of contracting and receiving fees from applicants. She was found "not guilty" on fourteen counts of soliciting, contracting and receiving. The "guilty" transactions involving contracting and receiving cannot be distinguished from the "not guilty" transactions and in all these cases, the essential facts were admitted by the defendant.

For example, compare the summary of the undisputed facts in two transactions:

Counts Nos. 24 & 25. The Home Owners Loan Corporation notifies the owner that the loan is granted but that the mortgages exceed the loan. Problem: how to get the 1st mortgage of $9,000 and the 2nd of $1,000 reduced? The defendant broker is engaged. She negotiates with the various mortgagees. Substantial reductions are obtained, although a dispute arises as to whether the defendant is to be credited with a reduction of $600 or $900. Defendant is paid $100. Verdict: *Guilty* (R. 87, 92, 95).

Counts Nos. 21 & 22. In this case, the 1st mortgage of $7,000 and the 2nd of $1,300 exceeded the loan which was tentatively approved by the Home Owners Loan Corporation. The same problem of reduction. Contract made by the owner with the defendant to reduce these mortgages. The defendant negotiates with the mortgagees. About $500 is admittedly reduced, although the usual dispute ensues as to just how much is to be credited to the efforts of the defendant. The defendant also wrote a two page letter for the owner, in the owner's name, to the Home Owners Loan Corporation. Defendant is paid $40 (R. 192, 198). Verdict: *Not Guilty.*

B. *Two Counts under Section 1467 (a) as to False Statements.*

Besides the six counts under Section 1467 (e) as to contracts and receipt of fees, the defendant was convicted on Counts Nos. 5 and 15, which charged her with knowingly making two false statements in two second mortgagee's consents as to the balance due on these two mortgages for "the purpose of influencing the action of the Home Owners Loan Corporation," contrary to Section 1467 (a) of the Home

Owners Loan Act. There is no allegation in either count that any loan to the respective owner was approved or actually made or that any payment was made to the defendant or to anybody else or that the two applications ever reached the stage of being sent to a closing attorney. Only the filing is alleged (R. 13, 31).

The second mortgagee's consent to take bonds is prepared by the Home Owners Loan Corporation, is mailed to the mortgagee by the corporation and is later filed by the mortgagee with the Home Owners Loan Corporation. As the copy set out in the indictment indicates, it is in form an offer by the mortgagee which states the amount for which the mortgage is a lien, including the unpaid balance of principal and interest, and the amount in bonds, plus a nominal cash sum, which the mortgagee will accept for a satisfaction of the mortgage. The consent is temporary, for a thirty day period, and may be withdrawn on ten days notice to the state manager of the corporation (R. 14, 32).

The mortgagee's consent to take bonds is not under oath nor acknowledged nor verified in any form nor is there any warranty as to the accuracy of the information (R. 14, 32).

The first form of mortgagee's consent as prepared by the Home Owners Loan Corporation in Count 5, called for more detailed information as to the mortgage than the revised form in Count No. 15. The detailed information was not given (R. 15). Under Count 5, the consent ends with the statement that a certain amount was due to the mortgagee (R. 15). There is no such specific statement under Count 15 (R. 33).

The opening paragraph of both consents is the same:

> "The undersigned is a holder of a second mortgage or other obligation, which constitutes a lien or claim on the title to the home property of * * * in the sum of $—, including unpaid balance of principal and interest, to date" (R. 14, 32).

C. *All Three Fraud Counts Nos. 6, 16 and 10 Dismissed on the Government's Own Motion During the Trial.*

Ordinarily, these three counts could be ignored. But in this case they are significant because they were the only three counts charging fraud—one, that of pretending to be an employee of the Home Owners' Loan Corporation and two counts which charged that the two false statements in the two mortgagee's consents were made with the intent to defraud the Home Owners' Loan Corporation and the two home owners. All these three counts were dismissed on the Government's own motion (R. 286).

When it is thus established that the two false statements were not made to defraud the home owners, and that they were not made to defraud the Home Owners' Loan Corporation, what "crime" is there left?

D. *The Bill of Exceptions.*

Petitioner repeats what was set forth in her reply brief and not disputed before the Circuit Court of Appeals. Convicted on May 29, 1936, she moved swiftly to comply with the rules governing criminal appeals. Notice of appeal was filed promptly on June 1, 1936; during that same week written notice and request was made upon the court stenographers to furnish a copy of the minutes of the trial. On June 13th, the court stenographers replied in writing demanding payment in advance of $400. On June 15th a check for the full amount was sent by the petitioner. About the end of June the stenographers stated that because of the rush of prior official business it would be impossible for them to deliver a transcript. The District Attorney and the trial judge were informed of these facts and an order was signed on June 30th extending the defendant's time to August 18th. Then there followed inquiries every week of the stenographers and the same answer: that prior official

business would delay delivery. The last letter was written on July 28th urging that the copy be furnished at the earliest opportunity. Several days afterwards, the copy was brought to the defendant and there remained a little over two weeks in which to prepare and print and settle the bill. Every effort was made by the defendant's attorney to expedite the work, but again the appellant's efforts were unavailing. The printer was unable to furnish the work on time. When he so informed the appellant, the situation was explained to the District Attorney on or about August 17th and he signed the stipulation extending the appellant's time and the trial judge signed the order on August 18th.

The Appellant relied on the stipulation of the District Attorney and the order of the trial judge. If they had not signed, the bill could have been settled on the stenographer's minutes either on August 17th or the 18th.

The Circuit Court held that it lacked the power to consider the bill of exceptions, and its decision rests solely on the want of power.

Summary of Argument.

1. The Home Owners' Loan Act of 1933, in so far as it creates the Home Owners Loan Corporation, is invalid:

(a) Congress cannot incorporate a private bank. The Home Owners Loan Corporation is exclusively a Corporation with limited private banking powers.

(b) The Act does not declare the Corporation to be a fiscal agent of the United States nor a depositary of public moneys nor require it to invest any funds in U. S. Bonds.

(c) The Act cannot be sustained under the "taxing for general welfare clause" because in substance the Corporation is a corporate substitute for the taxing and appropriating power, a device to evade using this power and not an exercise of it.

(d) And if it be considered an exercise of the taxing power, it is not for the general welfare because it did not affect any vital national interest or activity, merely reducing for a limited number of owners the nominal rate of interest by 1% (increasing the actual rate paid in the long run), staying some foreclosures and shifting the right to foreclose from many mortgagees to one large corporation.

(e) And whether it be for the general welfare or not, it invades a field of local activity reserved to the people and the states under the 9th and 10th Amendments.

2. Section 1467 "e" of the Home Owners' Loan Act, as amended in April, 1934, is invalid because it violates both the 5th and 6th Amendments:

(a) The Circuit Court of Appeals admits that "until the Corporation defined the fees which could properly be charged the crime was too vague and indefinite".

(b) Although there is not one word about the regulations in the indictment, the Circuit Court at the end of its opinion stated that the regulations had been issued and that the regulations so assumed cured the admitted vagueness of this section—apparently using the forbidden bill of exceptions to affirm the judgment, but not to reverse it.

(c) The regulations—which are found in the bill of exceptions only—do not adequately clarify the statute except as to services of appraisal, examination and closing title rendered by persons employed by the Corporation (R. 425); they leave untouched the zone covered by "and like necessary services", and the whole field of other services rendered by persons not employed by the Corporation.

(d) This section is invalid because if applied to persons not employed by the corporation, it constitutes a denial of their liberty and property without due process of law.

(e) Unlawful delegation of power. Not only is the Corporation to fix "ordinary charges" for specified services, but also for "like necessary services", and upon its definition of these indefinite clauses, the list of crimes is expanded or contracted.

3. Section 1467 "a" of the Home Owners' Loan Act is invalid because it is too vague and uncertain, makes acts criminal without any intent to defraud or any improper motive or any possible detriment to anybody and may be stretched so far as to infringe the right of free speech.

4. Bill of Exceptions should be considered by an Appellate Court when the defendant is without fault, has acted diligently, relied in good faith on the stipulation of the District Attorney and the order of the trial judge, and whose time to file has been in the main consumed by the acts of third parties over whom she had no control.

5. The appeal from the judgment and conviction is upon substantial and meritorious grounds.

ARGUMENT.

Point I.

The Home Owners' Loan Corporation is not authorized by the fiscal powers of Congress because the act creating it does not make it a depositary of public moneys, nor a fiscal agent of the United States nor require it to invest any funds in United States Governments bonds.

The Home Owners' Loan Act makes the Home Loan Banks fiscal agents of United States and depositaries of public money (Title 12, U. S. C., Sec. 1434). Likewise, it also grants this power to the Federal Savings and Loan Associations (Sec. 1464 (k)), and similarly, in other laws, a formidable list of other agencies from National Banks,

Title 12, U. S. C., Sec. 90 to Federal Credit Unions, Sec. 1767 have had conferred upon them this specific authority. Because of this express authority to act as financial agent of the Government, the R. F. C. was upheld in *Langer* v. *United States*, 76 F. (2d) 817. And for the same reason, the Federal Farm Land Bank Act was sustained in the case of *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, p. 211:

> "We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds (5% required to be so invested), brings them within the creative power of Congress, although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest."

Where the Corporation or bank has conferred upon it public functions, there may be added private functions as an incident to its public work or to enable it to perform its governmental activity more effectively. Upon the solid foundation of public function, there may arise a varied structure—a National Bank may act as trustee, executor, etc. (*First National Bank* v. *Union Trust Co.*, 244 U. S. 416), or such a bank may be incorporated "as a machine for the fiscal operations of the government" and exercise simultaneously the ordinary powers of a private bank. (*McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738, 872.)

But the Home Owners' Loan Act, while it makes the Home Loan Banks and the Federal Savings and Loan Association fiscal agents of the United States and depositaries of public moneys, *no where confers such powers on the Home Owners Loan Corporation.* In fact, not only did Congress fail to declare the H. O. L. C. a fiscal agent of the Govern-

ment, it actually authorized the Federal Reserve Banks to act as fiscal agents for the corporation. Title 12, U. S. C., Sec. 1469-I, reads: "The Federal Reserve Banks are authorized, with the approval of the Secretary of the Treasury, to act as depositaries, custodians and fiscal agents for the H. O. L. C." In short, the H. O. L. C. was never created as an agent for the fiscal operations of the United States and it was not able nor equipped to act as such for anybody.

It stands as a corporation with limited private banking powers to make loans to private individuals on their private homes. True, it is managed by the same board as manages the Home Owners' Loan Banks, its stock is owned by the Government, it has the free use of the mails and its bonds were first guaranteed as to interest and then as to principal by the United States. But these facts do not add to its public powers and functions. It is not declared by Congress to be a depositary of public moneys; it is not declared to be a fiscal agent of the United States; and it is not required to invest in United States bonds. It lacks the public foundation upon which the private powers may be attached. It remains a corporation equipped to do solely a private banking or mortgage business. And as the Court said in *Osborn* v. *U. S. Bank,* 9 Wheat. 738, p. 860:

> "It has never been supposed that Congress could create such a Corporation."

Subsequent amendments in 1935 authorizing the H. O. L. C. to purchase bonds of the Federal Home Loan Banks, shares of the Federal Savings and Loan Associations and of the Federal Savings and Loan Corporation, even if they could change the character of the H. O. L. C., cannot be considered as the indictment deals solely with the Act of 1933, as amended in April, 1934.

Point II.

Congress may tax and appropriate for the general welfare, but it cannot create a corporate device which in effect dispenses with the taxing power and is a substitute for it.

Admittedly, as the Circuit Court claims in its opinion, Congress is granted the power to tax to promote the general welfare of the United States. It may appropriate and spend for a variety of public purposes, beyond the precise ambit of the delegated powers, *United States* v. *Butler*, 297 U. S. 1.

Is the H. O. L. C. an exercise of that power? Or is it a corporate device to avoid using that power? Aside from the purchase of its stock of $200,000,000 by the Secretary of the Treasury on behalf of the United States, through funds made available by the R. F. C., the Corporation is completely the creature of the power to incorporate. As such, it is authorized to issue its own bonds, at first not exceeding two billions and later almost five billions, or to be exact not over $4,750,000,000. In essence, there was created a Corporation, which spread and grew far beyond the puny appropriation by the United States of a couple hundred millions, into a corporate giant with billions of bonds. This whale of a Corporation was not produced by the taxing and appropriating power. The United States after the small initial amount for the stock, did not tax nor appropriate out of the general funds of the Government. Yet it grew into a giant whale of tremendous proportions. Without taxing and without appropriations and without the spending power of the Government, the H. O. L. C. expanded from a two billion to an almost five billion dollar institution.

It may be said correctly that the H. O. L. C. is a corporate entity which dispenses with the exercise of the taxing

and appropriating power of the Government. It is clearly a substitute for it. In effect, the United States says:

> "We shall not tax nor appropriate government funds; we shall create a corporate substitute, capable of standing on its own feet and which can issue its own bonds."

May Congress incorporate such a Corporation? The power is not expressly given but it may be implied only when the Corporation is a convenient, useful and essential instrument to execute a power granted to Congress. *But the incorporating power may not be implied to avoid using the delegated power.* If that were permitted, small appropriations would be sufficient to spawn an unlimited corporate progeny, not through the exercise of the taxing and spending power, which Congress has, but by dispensing with the taxing power and substituting Corporate creatures for every purpose which might conceivably be labeled general welfare. Practically speaking, Congress could then transform an implied power of limited scope into an express power of general incorporation.

Point III.

And if the Home Owners' Loan Corporation be considered an exercise of the taxing power, it is not for the general welfare because it changes slightly certain creditor-debtor relations by reducing the nominal rate of interest by 1% (but increasing the actual rate paid in the long run), and shifting the right to foreclose from many mortgagees to one large corporation without substantially affecting any vital national interest or relationship.

In its opinion, the Circuit Court of Appeals, lists a number of appropriations made by Congress to prove "what has been accepted to be the expenditure of public funds for a public purpose." The first answer may be made in words of this court in *United States* v. *Butler*, 297 U. S. 1, page 73:

"Such expenditures have not been challenged because no remedy was open for testing their constitutionality in the Courts".

Besides, practically all of those appropriations involve either the preservation of natural resources or the health and education of the country's citizens. On such things depends the very existence of a nation, the quality of its manhood and womanhood. They touch life itself, and affect people in their most central and vital relations—as citizens and consumers and workers, whether they shall have knowledge and light, what they shall eat and produce, whether they shall work and live.

Another characteristic of these appropriations to preserve natural resources and promote the health and education of the people is that they do not involve ordinary private and commercial transactions. They do not modify existing private or personal contracts between individuals. They invade a field hardly touched by private contract or private enterprise. It might be said that they deal with a public domain or with public relations, separate and apart from the field of private activities.

How different is the H. O. L. C. It modifies slightly certain existing private contracts between certain private debtors and creditors. The debtor now substitutes for his existing contract with one or more creditors to whom he agreed to pay 6% interest, a new contract with a large corporation to which he agrees to pay 5% over a longer period of time, with certain installments of principal. The right to foreclose is not abolished nor stayed; it is shifted from many mortgagees to one large corporate mortgagee. The right to take deficiency judgments likewise is not abolished nor stayed; it is centered in the Home Owners' Loan Corporation.

Does such a minor change of private debtor-creditor relationships constitute "the general welfare"? If it does,

then the sky is the limit as to what may be done under this clause.

POINT IV.

And whether or not the Home Owners' Loan Corporation is an exercise of the taxing power for the general welfare, it is invalid because it invades the rights and powers reserved to the States and the people.

While the taxing power is "the least limitable" of powers, whose precise boundaries it would be disingenuous to attempt to fix, there is no dispute that every delegated power, however general, is hedged in by the very Constitution in which it is found. All of the delegated powers, for example, are subject to the Fifth Amendment. (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, p. 589.) And with the exception of powers over money matters—where there is coupled with the grant to Congress a definite prohibition against their exercise by the states—and possibly that over foreign commerce (*Board of Trustees* v. *United States,* 289 U. S. 48, p. 57) all of the delegated powers, including the taxing power, are subject to the restraint of the 9th and 10th Amendments. Unless taxing-for-the-general-welfare is subject to these restrictions, it may be expanded to cover practically every substantial activity in the Country, Congress becomes omnipotent and the local rights and powers of the people and the states may be obliterated. Such a concentration of power is a denial of constitutional federalism; it destroys the balance and separation of powers between nation, states and people which our system established; and it tends to produce the very apoplexy at the center and paralysis at the extremities which federalism prevents. True, the cardinal principle of statutory construction is "to save and not to destroy," but equally, the cardinal principle of Constitutional construction must be to save and not to destroy the Constitution.

The Circuit Court of Appeals in its opinion says that there is no attempt to employ the taxing and spending power to accomplish prohibited ends as there was found to be in *United States* v. *Butler,* 297 U. S. 1. But is the difference visible? The lending of money to private individuals on their private houses, the rates of interest to be paid by them, the terms of their mortgages, fees of mortgage brokers, appraisals of private homes, examination of titles to such homes, the closing of loans to the same homes and the foreclosure of mortgages are indubitably private and local activities. They are just as private and local an activity as the planting of wheat or potatoes. If Congress, through the taxing power, cannot invade the local field of making contracts with farmers to reduce their acreage of wheat, it cannot enter the local field of making contracts to reduce the rate of interest payable by a homeowner, to substitute a new form of mortgage, with a long term investment instead of a short term investment, with amortization of principal, and with the customary power to foreclose in the event of default.

And by analogy, if Congress, according to *Ashton* v. *Cameron County Dist.,* 298 U. S. 513, cannot extend the bankruptcy power to provide for voluntary petitions by embarrassed districts to readjust their debts because the reserved powers of the States block the way, with equal certainty the same powers and rights reserved to the people or the states block voluntary applications by embarrassed debtors for the readjustment of the encumbrances on their homes.

Nor is the contrary held by the case of *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, also cited in the opinion of the Circuit Court of Appeals. While the argument that the Farm Land Bank could be sustained under the taxing for general welfare clause was pressed vigorously, the court merely continued the line of reasoning of Chief Justice

Marshall as to the incorporation of a National Bank. If a National Bank or a Farm Land Bank were authorized to act as fiscal agent of the United States, it could also be empowered to trade with individuals. But trading or loaning money to individuals remained a private enterprise, a local activity, which Congress could not undertake by a Corporation devoted exclusively to that local and private field.

POINT V.

Sections 1467 "A" and "E" violate both the 5th and 6th Amendments, deprive people of their liberties and contract rights without due process of law, punish them for not knowing a new law, vague and uncertain, about which lawyers are in doubt and the lower courts in conflict.

Even if the main trunk should stand, these two branches of the Act should be lopped off unhesitatingly. (In *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315, another section of the Home Owners' Loan Act regulating the conversion of State associations into Federal Savings and Loan Associations was invalidated).

A. *First, let us examine Section 1467 "e".* The Circuit Court of Appeals expressly admits in its opinion that the statute by itself is too vague and indefinite: "It is undoubtedly right to say that until the Corporation defined the fees which could properly be charged the crime was too vague and indefinite."

What has cured this obvious defect? The regulations of the Corporation? "At the time that the appellant committed the acts charged," so continued the opinion of the Circuit Court of Appeals, "the Corporation had already issued its regulations and defined the fees and charges which could validly be solicited and received".

But where is the proof that any such validating regulations had been issued? The indictment does not contain a

word about any regulations; it repeats the exact words of the statute (R. 7). *The only proof of any regulations appears in the bill of exceptions, which the Circuit Court claims it is forbidden to consider.* Well, if it cannot look at it to reverse the judgment, it cannot peek at it to affirm the judgment.

However, the regulations, as set forth only in the bill of exceptions (R. 422-6), do not remove the essential vagueness and indefiniteness of the statute. They fix the fees for a few specified services such as appraisal, examination of title and the closing of loans. But these remove only the lighter fog surrounding the statute. What are "like necessary services," probably the broadest expression in this section? To whom does the section apply? Is it limited to appraisers, examiners and attorneys employed by the Home Owners' Loan Corporation? Does it include the services of mortgage brokers engaged by the owners to modify or adjust or obtain reductions of Mortgages? What about services rendered to an applicant which have only an indirect bearing on the loan? The regulations will be searched in vain for any answer (R. 422-6).

The vagueness in the statute begets the conflict in the decisions. In *Romano* v. *Magliulo*, 278 N. Y. S., 986, this section was restricted to the employees of the Home Owners' Loan Corporation, namely, the appraisers, the title examiners and the closers who were employed by the Corporation itself. (Admittedly, the defendant in our case was not employed by the Home Owners' Loan Corporation.) In *United States* v. *Willard*, 8 Fed. Supp. 356, p. 357, nothing is said as to any such restriction, but the Court held that until "ordinary charges" are regulated and defined by the Corporation "the statute is lacking in that certainty which is required to uphold criminal statute and indictments thereunder against attack for vagueness and indefiniteness". As to the construction of the statute after the regulations were promulgated, the Court did not decide.

Another variation is found in *United States* v. *Monoghan, Eastern District of Mo.*, Jan. 9, 1935, par. 17,711, Reference Library C. C. Corp. Before the amendment of April, 1934, the statute was certain enough, so the Court ruled. As to the amended statute, upon which our indictment is founded, the Court said:

> "The statute as above set out was effective from June 13, 1933 until April 27th, 1934, when it was amended. The amendment omitted the words 'in connection with a loan by the Corporation, or an exchange of bonds or cash advanced under this Act'. This apparent oversight has rendered the present statute entirely too vague to constitute the basis of a criminal charge."

And in the unreported case of *United States* v. *Damon and Layton*, District of Minnesota, Judge Molyneaux, after trial, dismissed the indictment, holding that *both before and after the amendment*, the statute was too vague. Official memorandum, page 5, 6, January 9, 1935:

> "Even if these words ("in connection with a loan by the corporation") were in there, they have left it hazy and vague as to what would be improper charges condemned by the law . . . I am sure that I cannot leave it to the jury; I would have to say whether it was condemned by the statute. But the statute is so vague that I cannot decide the question as to whether it was in connection with a loan or was not in connection with a loan, or whether it was anything that was condemned by the statute."

In the Eastern District of New York this section is upheld but with the devastating results which Judge Molyneaux feared in the Minnesota case and which compelled him to take the case from the jury. In our case, the jury, to take only one example of similar contradictions, convicts the defendant under Counts Nos. 24, 25, for recovering $100 and acquits under Counts Nos. 21, 22, for receiving $40,

although in both instances, the services, the contracts and the receipt were without question identical and all admitted by the defendant. The jury was left in a haze, smothered by instructions which could not make clear and definite what was blurred and indefinite in the statute (R. 92, 196, 472, 476-8).

B. *Section 1467 "a", as to false statements:*

(1) What is covered by such a statute? "Any statement knowing it to be false" for the purpose "of influencing in any way" the action of the Home Owners' Loan Corporation. Who can tell what trivial slip of tongue or pen is prohibited by such a statute? It need not be in writing. It need not be under oath. It need not be material. It need not be with the intent to defraud nor to influence in an improper way nor to jeopardize the loan in the slightest degree.

The Circuit Court in its opinion says that Congress has the power "to safeguard the lending system which it had established." To safeguard against what? Material and relevant perils; substantial dangers or defects, which might seriously impair the security behind the loan; safety against whatever situations directly affected the repayment of the loan—against all such, Congress should erect protective barriers.

But any statement in the 2nd mortgagee's consent cannot endanger nor directly influence any loan made by the Home Owners' Loan Corporation. The Corporation loaned on the security of the land and building and earning capacity of the owner. These formed the central core of the transaction. Their value is not stated nor fixed nor influenced by such remote and minor things as 2nd mortgagee's consents. The very practice of the Home Owners' Loan Corporation negatives reliance on 2nd mortgagee's consents. It made three independent appraisals; it hired a title company to search the records; it hired the closing attorney;

it drew all the papers; it might or might not grant the loan, depending on the type of house, legal defects or encumbrances, lack of value or doubtful income of the owner; and then very often the loan was less than the amounts which the mortgagees had consented to take, in which event, the owner was notified that he would be obliged to get the necessary reductions and then report back to the Home Owners' Loan Corporation, which in turn, would arrange for the closing, and at this closing the final and correct adjustments would be made.

Besides, second mortgages, as a matter of common knowledge, were so deflated that they had only a nuisance or general bargaining value. It was no longer a question of precise figures as to exact sums due, but what nominal sum, if any, would be paid to the second mortgagee in return for the satisfaction piece. What was the effect of this well known practice? It destroyed the need for accuracy. Why spend time over old receipts to figure out if the correct balance due on a second mortgage was just $874.50, when $100 or so at the most would be available?

Besides, the way the second mortgagee enters the picture and the form of the consent, prepared by the Home Owners' Loan Corporation, all limit any purpose to influence to almost the vanishing point. The second mortgagee is not an applicant for a loan. The Home Owners' Loan Corporation sends him a mortgagee's consent in which it asks him to put down the amount for which the mortgage is a lien, including unpaid principal and interest, and to state what sum in bonds he will take to satisfy it. This consent is a temporary agreement for 30 days, which may be withdrawn after that on 10 day notice. As the time required invariably exceeded the 30 days, the consent was obviously a tentative offer subject to cancellation at any time before closing. (Parenthetically, in neither Count No. 5, nor Count No. 15, was there any allegation that the loan reached

closing or was ever considered or was ever made—merely that the consent was filed) (R. 13, 31).

And there is another fact which belies any genuine reliance on the so-called "false statements" as to the balance due. The very form of the consent under Count No. 15 is ambiguous. It asks for the amount for which the mortgage is a lien, including the unpaid balance and interest. Of record, the original amount appears without any reduction certificate. Therefore, it is a lien for that original amount, even though a smaller balance may actually be due. Therefore, to say as the defendant did under Count No. 15, that the second mortgage was a lien for $650, including unpaid principal and interest, is not technically incorrect as the original amount of this second mortgage was $650. (As to Count No. 5 (R. 13), the form of the prior consent was slightly different; it asked not only the sum for which the mortgage was a lien, including unpaid principal and interest, but also separately what was due on it. But in this Count, a confusion as to the original amount of the mortgage, which was actually $1000., is indicated because in the application for the owner, also made by the defendant, the original amount of the second mortgage was erroneously stated to be $650, instead of $1,000., and this confusion as to the original amount of the second mortgage may have been the decisive factor in arriving at the incorrect balance due.)

That such careless guesswork could not be the basis or source of any appreciable "influence" is further established by the final paragraph of the second mortgagee's consent. Both forms contain a paragraph in which the second mortgagee states what sums in bonds he will accept for his satisfaction piece (R. 15, 33). *What he will take in bonds is not limited. He is not legally restricted to the exact cash balance due on his mortgage.* He could ask for less or for more. He might ask for more in bonds because he disliked

the low bond interest, or because he feared that the market value of the bonds might drop. Whatever the motivating cause, what the second mortgagee would consent to take in bonds was flexible, wholly within his discretion and would supersede any guess as to the exact balance due.

In short, no loan was applied for by a second mortgagee and no loan was made on the security of a second mortgage; a satisfaction piece of the second mortgage was purchased for whatever in bonds the second mortgagee could be persuaded to take; and the loan to the owner was made solely on the security of the property and earning capacity of the owner, with no practical attention being paid to any second mortgagee's consent.

(2) Even freedom of speech and criticism might be checked and the critic rendered subject to indictment under this section. For example, suppose a critic sharply disagreed with the foreclosure policy of the Home Owners' Loan Corporation and its former practice of entering large deficiency judgments; and in making his criticism incorrectly stated the number of deficiency judgments which had been entered—the critic could be indicted for knowingly making a false statement for the purpose of influencing in any way the action of the Home Owners' Loan Corporation.

(3) It is no answer that indictments would ordinarily not follow such incorrect statements and would only be found when fraud was practiced on the Home Owners' Loan Corporation and the security for the loan was materially impaired. Such was the case of *Patrick* v. *United States,* 77 F. (2d) 442, where Patrick obtained a loan from the R. F. C. on fake warehouse receipts by falsely representing that there was wheat in the warehouse when in fact there was none. So in *McLanahan* v. *United States,* 12 F. (2d) 263, under the Federal Farm Land Bank Act, sustaining a somewhat similar section, the particular statement was

held relevant and material. Besides, the statement under the Farm Land Bank Act must be made under oath, it must be in writing and it is made by the applicant owner who expects to make an important contract with the lending agency. Likewise, in *United States* v. *Kreidler,* 11 Fed. Supp. 402, the only case found by petitioner directly involving this particular section, it was sustained on the ground that the secret agreement by the first mortgagee to take back a second mortgage was material, violated an important rule of the Corporation and might diminish the owner's ability to pay the Home Owners' Loan Corporation. But these decisions in effect amend this section, and other somewhat similar statutes, by adding the words "material" and "relevant" which were deliberately omitted by Congress. Instead of practically rewriting it, the Court should strike it out and curb the too easy creation of statutory criminals except where there is fraud or material misrepresentation or substantial impairment of the security back of the loan.

(4) The bounds of moderation or reason should not be broken unless urgently required to safeguard the agency or function in question. Of an entirely different act, in *W. B. Worthen* v. *Kavanaugh,* 295 U. S. 56, p. 60, the Court said:

> "Even when the public welfare is invoked as an excuse, these bounds (of moderation or reason) must be respected."

In other statutes, Congress has kept within more reasonable bounds. In the case of Federal Reserve Banks, the false statement must be *material* (Title 12, U. S. C., Secs. 595-6); the Federal Credit Association (Title 12, U. S. C., Sec. 840-6) punishes "any *material* false representation for the purpose of obtaining any loan"; and in the S. E. Act, Title 15, U. S. C., Sec. 78ff, the statement must be "false or misleading with respect to any *material* fact."

(5) The same objections apply to the clause: "Whoever willfully overvalues any security." And besides, if to overstate the amount due on a second mortgage is to "overvalue a security," then the section by making overvaluation a district offense has taken it out of the class of false statements and put it in its own separate category. Therefore, if a defendant states a greater amount than is correctly due that would constitute the offense of overvaluation, and the defendant could be indicted only for that particular crime. Not having been so charged, Counts Nos. 5 and 15 of this indictment, which set out only an overstatement of the balance due or overvaluation, should be dismissed.

C. As to both Section 1467 "a" and "e", not only are they too broad and indefinite, forming dragnets capable of catching big and little fish, whales and minnows, but even if they were clear and limited, they are new regulations, administrative rules, the existence and extent of which nobody knows in advance. For a considerable preliminary period, even lawyers are in a fog, courts in conflict, and the layman completely bewildered. The rule that ignorance is no defense is surely inapplicable to such a situation. That rule was based on criminal laws which were criminal by common consent and common knowledge. This general certainty and knowledge justified the presumption and the rule. Likewise, the admitted confusion and lack of knowledge on everybody's part today should be the foundation for a fairer and more sensible rule. Already, such a rule is in the making. In S. E. Act, Title 15, U. S. C., Section 78ff, there is this provision:

> "but no person shall be subject to imprisonment within this section for the violation of any rule or regulation *if he proves that he had no knowledge of such rule or regulation.*"

A further advance toward a genuine due process of law is outlined, although not commented upon, in *Morehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587, 606:

> "If after the hearing he approves the report, he 'shall make a directory order which shall define minimum fair wage rates,' Section 557. Upon hearing and finding of disobedience the Commissioner may publish the name of an employer as having failed to observe the directory order Section 559. If, after a directory order has been in effect for nine months, the commissioner is of opinion that persistent non-observance is a threat to the maintenance of the prescribed standards, he may after hearing make the order mandatory. Section 560. Violation of a mandatory order is a misdemeanor punishable by fine, imprisonment or both. Sec. 565."

Such a procedure is the substance of due process of law and corresponds to the actual facts of today. Any other makes a defendant the sport or victim of chance or of the ignorance of what it is impossible to know.

Point VI.

Section 1467 "e" constitutes an unlawful delegation of crime declaring power to the Home Owners' Loan Corporation.

Under this section, the corporation is authorized to decide "ordinary charges" not only for examination and perfecting of title and appraisal, but also for "like necessary services". And according as the Corporation interprets that phrase strictly or broadly, the field of criminal acts is contracted or broadened. If it decides that Act A is a "like necessary service", the charge is authorized and the citizen who performs it is not a criminal. If on the other hand, it should conclude that Act B is not a "like necessary service", then the citizen who performs it may land in jail.

Who can predict with any reasonable certainty what acts will be legal and what acts will be illegal under such an elastic standard? Has Congress the right to substitute such guess work for the definite provisions of a penal statute? We think not. When it authorizes another body to increase or decrease its range of application, pursuant to an extremely general phrase, you have "delegation running riot". And what are "ordinary charges"? By what place, time or period or average are they to be decided? The usual answer is that such things do not admit of precise measure. And the answer proves that they should not form part of a criminal statute.

POINT VII.

Where a strict construction will in practice nullify the purpose of Rule IX, that construction should not be adopted.

Granted that the strict wording of Rule IX appears to limit the trial judge to orders signed within the thirty-day period. But the extension may be for such time "as may be fixed by the trial judge." What extension may be granted within that period? Three months? Four months or more? If that may be granted by one order, why should not the trial judge—with subsequent facts more clearly justifying it—do with a few separate orders what he could have done with one? Why should a trial judge with one order, in the dark so to speak, grant three or four or more months' extension, but be impotent to grant the same total extension separately, although based on fuller information, completely warranting such action?

Even though the letter of the rule may call for a strict construction, where such a construction in practice will nullify the purpose of the rule, that construction should not be adopted. In effect, the literal construction will limit the

trial judge to one order. Upon that one signature the fate of the defendant would depend. No matter what unforeseen contingencies, no matter what harshness or injustice would be involved, no matter what efforts the appellant made, no matter if thwarted by forces beyond the appellant's control, there would be no escape from the pitiless doom of that one order.

Turn a rule into an idol exacting unjust and hideous sacrifices and what will men do? Every lawyer and every judge would instinctively be forced to cooperate to defeat it. That single order, if final, would be stretched to the very maximum. No appellant would dare ask for a reasonable or minimum extension and no trial judge would refuse even more time than is reasonably necessary when he knew that the one order was the last. In this way, the purpose of the rule would inevitably be nullified.

On the other hand, if the purpose of the rule—promptness with justice—governs, you will establish tendencies and practices and attitudes of mind on the part of attorneys and trial judges which will enforce the spirit of the rule, instead of nullifying it. The parties knowing that more than one order is obtainable, will ask and be granted only a short extension, and ordinarily that will be sufficient. And if unexpected difficulties were encountered, the trial judge, with the facts before him, could grant additional time but still be within the extension which he could have granted originally if all the facts and obstacles had been known at that time.

Point VIII.

Where a trial judge signs an order a defendant should be able to rely on it, particularly where the signing deprived the defendant of the opportunity to settle the bill on the stenographer's transcript within the time limit of the first order.

It must be remembered that on August 17, 1936, when the second order was submitted, the Circuit Court of Appeals, Second Department, had not yet ruled on the power of the trial judge to sign an order after the thirty day period. That very question was left undecided in the case of *United States* v. *Adamowicz,* 82 F. (2d) 288. Outside of the 2nd Department, up to that time, there had been several decisions—*Yep* v. *United States,* 81 F. (2d) 637, and *Gallagher* v. *United States,* 82 F. (2d) 721—which held such extensions invalid, but nevertheless the Courts reviewed the record and carefully considered the bill of exceptions. (And in the *Wolpa* v. *United States,* 84 F. (2d) 829, the original order itself was declared void, with one judge dissenting, and the subsequent decisions construing this rule were not then available.)

Such were the decisions when our second order was submitted. The facts justifying the extension were submitted to the District Attorney and to the trial judge. The district attorney signed a stipulation consenting to the extension and the trial judge signed the order, and the appellant relied on that stipulation and on that order.

If the trial judge had refused to sign, then the appellant could and would have settled the bill on the stenographer's transcript instantly and within the time limit of the first order. But when the trial judge signed the order extending her time, the need for such emergency action disappeared. That opportunity and right were lost because the appellant

relied on the order signed by the trial judge. Is such reliance so unreasonable as to justify what is in reality a denial of her appeal?

Point IX.

The Circuit Court of Appeals has the power under Rule IV and IX of the Criminal Appeals Rules to consider a bill of exceptions although filed pursuant to the order of the trial judge signed after the expiration of the thirty-day period.

However restricted the trial judge may be by Rule IX, no such fetter is imposed upon the Appellate Court. It may correct, amplify or reduce the record before it. It may modify any order of the trial judge. It is given complete control of the proceedings on appeal. The rules clearly grant this corrective power to the Appellate Courts.

In fact, the very rules adopted by the Circuit Court of Appeals, 2nd Department, with reference to assignment of errors, show that the Court has broad remedial powers. For example, under Rule IX the assignment of errors must be filed within the same time as the bill of exceptions. Strictly interpreted, no assignment should be considered if filed after the specified time. But the Circuit Court has itself adopted the following rule:

> "In criminal cases the assignment of errors provided for by Rules VIII and IX of the Supreme Court rules in Criminal cases shall conform to this rule and errors not assigned will be disregarded but the Court at its option may notice a plain error not assigned."

Clearly, this indicates the Court's opinion that it possesses the power to correct errors although not assigned within the time stipulated under Rule IX.

The petitioner is not unaware of the series of recent decisions in various Circuit Courts, from *Yep* v. *United*

States, C. C. A., 10th, 81 F. (2d) 637, to *Young* v. *United States*, C. C. A., 10th, 88 F. (2d) 305, which hold to the contrary. And we may agree with the statement in *Gallagher* v. *United States*, C. C. A., 8th, 82 F. (2d) 721, 722, that "the purpose and intent of the rules themselves were to expedite the hearing of criminal cases on appeal".

But that laudable purpose must not be twisted into a fetich of the Great God Speed. More fundamental even than a speedy appeal, is a fair appeal or a fair trial. And if the trial judge is to be held bound to the letter of Rule IX, then by double necessity there must be somewhere the power to correct the inevitable injustices which may result without any fault whatever on the part of a defendant. Even if the rules did not expressly grant such power to the Appellate Courts, they possess it by the inherent nature of their authority and function. They and only they can guarantee a defendant a fair trial. Their power to do justice cannot be circumscribed nor surrendered by Appellate Courts. They must, if they are to perform their great office, be ever ready and free to leap to the rescue of appellants caught in procedural coils without any fault on their part. No Appellate Court should ever declare in effect: "Although you have acted diligently and are without fault, we cannot save you. Neither your innocence nor diligence is of any avail. A certain rule has made slaves of us all."

Point X.

The Circuit Court of Appeals refused to review the assignment of errors and bill of exceptions solely because of the alleged want of power and not in the exercise of its discretion.

In its opinion, the Court of Appeals said:

"Although the Appellant obtained one valid extension within the permissible period, the bill of excep-

tions was not settled and filed in due time and we are therefore foreclosed from considering the errors that are assigned respecting the bill of exceptions."

There is here no question of the exercise of the Court's discretion nor of the abuse of its discretion. The sole issue is the alleged want of power, and that we have already discussed under Point IX. This adequately distinguishes it from the case of *United States* v. *Ray* (C. C. A., 2nd Dep't) 86 F. 2d) 942.

Point XI.

The appeal from the judgment of conviction is upon meritorious grounds.

While a discussion of the merits of the appeal at this time would be improper, it is proper to state just a few indisputable facts to show that the defendant did not have a fair trial and that the errors made were so prejudicial as to compel review and correction.

(a) Under Counts Nos. 11 and 12 the defendant was convicted for contracting and receiving fees although the owner admitted that she was not an applicant when the contract to modify the mortgage terms was made on June 5th; that the $50. payment was paid over to the first mortgagee on June 11th; that the defendant withdrew from the transaction on that date; and that the owner herself subsequently, towards the end of June, made her own application for a loan at the Home Owners Loan Corporation (R. 158).

(b) Under Counts Nos. 21, 22, 24 and 25 the contracts to reduce the mortgage principal, the services and the receipts were identical and all admitted by the defendant. The jury said "guilty" as to Counts Nos. 24 and 25 and "not guilty" as to Counts Nos. 21 and 22, re-

vealing the confusion of the jury under the erroneous and bewildering instructions of the trial court (R. 472, 476-8).

(c) The conduct of the Assistant District Attorney in his opening, referring to other alleged offenses, in his repeated efforts to introduce matters ruled out, the constant and unfair use of leading questions, such as—"Did Miss Kay ever say that she would fix things with the Home Owners' Loan Corporation" (R. 164)—plus incorrect statements and inflammatory language in the summation—calling the defendant a "vulture" (R. 438)—deprived the defendant of a fair trial (R. 86, 157, 163, 255, 393, 438, 442, 453, 454). Altogether, it constitutes the very type of misconduct condemned by the Court in *Berger* v. *United States*, 295 U. S. 78.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the order and the judgment of the said United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

W. S. CULBERTSON,
Counsel for Petitioner.
FRANK R. SERRI,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Gertrude Kay, of full age, being duly sworn, according to law, upon her oath deposes and says:

I am the petitioner in the foregoing petition named; I have read the same and am familiar with the matters stated therein. The facts, matters and things therein contained, so far as they relate to my acts, are true, and so far as they relate to acts of others, I believe them to be true.

My said petition is filed in good faith for what I verily believe to be just and legal cause, and it is not intended for the purpose of delay.

GERTRUDE KAY.

Subscribed and sworn to before me this 6th day of May, 1937.

[SEAL.]

RAPHAEL SERRI,
Notary Public, Kings County.

Kings Co. Clerk's No. 30 Reg. No. 8039.
Commission Expires Mar. 30, 1938.

APPENDIX A.

Statutes.

The provisions of the Home Owners' Loan Act, as amended April 1934, which the defendant is charged with having violated are found in Title 12 U. S. C., Section 1467 (a) and (e):

(a) Whoever makes any statement, knowing it to be false, or whoever wilfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this chapter, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000. or by imprisonment for not more than two years, or both.

(e) No person, partnership, association or corporation, shall, directly or indirectly, solicit, contract for, charge, or receive, or attempt to solicit, contract for, charge, or receive, from any person applying to the Corporation for a loan, (1) any fee, charge, or other consideration, whether bond or cash, except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services, or (2) any moneys, check, note, or other form of obligation, representing payment of any difference which may exist between the market value and the par value of the bonds of the Home Owners' Loan corporation. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than two years, or both.